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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

KERSH LAKE DRAINAGE DISTRICT, ETC., ET AL.....*Petitioners*

v. No. 595

A. J. JOHNSON.....*Respondent*

BRIEF FOR RESPONDENT ON CERTIORARI

CHARLES T. COLEMAN,
WALTER G. RIDDICK,
For Respondent.

PARAGON PRINTING CO., LITTLE ROCK

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KERSH LAKE DRAINAGE DISTRICT, ETC., ET AL.....*Petitioners*

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STATEMENT OF THE CASE

In the solution of the questions presented in this case it is necessary to understand the relative rights under Arkansas laws of Arkansas drainage districts, the taxpayers in the districts and the creditors of the district, as well as to determine exactly what was involved and what was done, not only in the case before the court but in the other cases in both the state and federal courts in which the district and its bondholders, or the district and its taxpayers, were parties.

The Kersh Lake Drainage District is an Arkansas improvement district organized under the general drainage law of Arkansas. Respondent Johnson is a landowner and taxpayer in the drainage district.

The general law of Arkansas for the organization of drainage districts is contained in Volume 1, chapter 52 of

Pope's Digest of the Statutes of Arkansas, beginning at page 1285,

The commissioners of the district assess the value of the benefit to accrue to each tract of land within the district by reason of the construction of the drainage improvement. The assessment being completed, the court having jurisdiction of the organization proceedings, enters an order providing that there shall be assessed upon the real property of the district a tax sufficient to pay the cost of the improvement "which tax is to be paid by the real property in the district, in proportion to the amount of the assessment of benefits thereon and which is to be paid in annual installments, payable not to exceed twenty-five per cent for any one year as provided in such order."

Collection of the proportion of the benefit annually levied against the land is enforced in the following manner:

> "All taxes levied under the terms of this act shall be payable between the first Monday in January and the 10th day of April of each year; and if any taxes levied by the county court in pursuance to this act are not paid at maturity, the collector shall not embrance such taxes in the taxes for which he shall sell the lands, but he shall report such delinquencies to the board of commissioners of said district, who shall add to the amount of the tax a penalty of twenty-five per cent; and said board of commissioners shall enforce the collection by chancery proceedings in a court of the county in which the lands are situated having chancery jurisdiction; and said court shall give judgment against said lands, railroads or tramroads for the amount of such taxes, and said penalty of twenty-five per cent and interest on same, from the end of said sixty days allowed for the collection thereof, at the rate of six per cent per annum, and all costs of the proceedings. Such judgments shall provide for the

sale of said delinquent lands for cash by a commissioner of the court, after advertisement hereinafter set out. Said proceedings and judgment shall be in the nature of proceedings *in rem*, and it shall be immaterial that the ownership of the said lands be incorrectly alleged in said proceedings, and such judgment shall be enforced wholly against such lands, and not against any other property or estate of said defendant. All or any part of said delinquent lands, railroads or tramroads for each of said counties may be included in one suit for each county, instituted for the collection of said delinquent taxes, etc., as aforesaid; and notice of the pendency of such suit shall be given by publication weekly for four weeks before judgment is entered for the sale of said lands, railroads, or tramroads, in some newspaper published in the county where such suits may be pending.

Section 4482, *Chapter* 52, *Pope's Digest of the Laws of Arkansas, Volume* 1, *page* 1296.

The district bondholder is protected by the following act:

"Section 1. Hereafter all taxes in levee, drainage and road districts shall be collected at the time and in the manner and by the officers specified in the statutes creating them, or under which they were organized, and the duty to promptly extend and collect such taxes may be enforced by a mandamus, or by a mandatory injunction in equity, at the instance of any landowner in the district, the trustee in any deed of trust securing the bonds of the district, the holder of any bond as to which the district has defaulted in the payment of interest or principal, or any other creditor of the district. The remedies herein provided shall be exclusive, and all laws providing for or authorizing the appointment of a receiver for any such district are hereby repealed, and no court shall appoint a receiver to collect levee, drainage or road district taxes."

Act No. 46 *of* 1933, *page* 126.

These acts fix the relative rights, powers and duties of the district, its taxpayers and its creditors. The district sold no bonds but instead issued certificates of indebtedness to the contractor who constructed the improvement in payment for the construction work. Certain of these certificates passed into the hands of the State Bank & Trust Company of Wellston, Missouri, and the district becoming delinquent in their payment, the bank secured in the United States District Court for the Eastern District of Arkansas on the 1st day of November, 1935, a judgment against the district for the amount of its certificates with interest. The bank's judgment being unpaid, it instituted in the same court a suit for a mandatory injunction requiring the commissioners of the district to proceed with the collection of taxes within the district with which to pay the bank's judgment. (Rec. 26-28).

In this cause, the bank, after setting out its judgment and the fact that it was unpaid, alleged the organization of the district under the Act of Arkansas herefore quoted and the assessment of benefits in the district in the amount of $293,191.90. It further alleged that under the applicable acts of Arkansas the benefit assessed bore interest at the rate of six per cent per annum and that a tax at the rate of six and one-half per cent had been duly levied upon the benefits in the district but that the commissioners, claiming that the benefits had been exhausted by collection, had instructed the county clerks of the counties in which the district was located not to extend taxes upon the taxbooks. The bank prayed for a mandatory injunction requiring the county clerks of Jefferson, Lincoln and Desha Counties of Arkansas, who were made parties defendant to extend against the lands in the district the taxes levied by the Jef-

ferson Circuit Court; requiring the collectors of the several counties to collect the tax extended; and requiring the commissioners of the district to institute and prosecute to a conclusion suits to collect all taxes so extended which were unpaid; the extension and collection of the taxes to continue under the injunction sought until an amount sufficient to discharge the plaintiff's judgment had been realized. (Rec. 26-28)

To this complaint the defendant district filed an answer denying each material allegation, asserting that the Jefferson Circuit Court had not provided for the collection of interest upon benefits assessed in the district, averring that the claim for interest upon the assessments was barred by limitation, and alleging that taxes in excess of an amount sufficient to pay the cost of the improvement as determined by the organizing court had been collected. (Rec. 28-29)

This pleading was followed by an amended answer which elaborated the defenses set up in the original, adding that the Act of Arkansas of 1919 providing for interest upon benefits was unconstitutional and void as applied to this particular district.

On December 28, 1936, a decree in this case was entered by the federal court in favor of the bank (Rec. 18-22). In its findings of fact incorporated in the decree, (Rec. 20-21) the court, after finding the organization of the district including lands in Jefferson, Lincoln and Desha Counties, found that benefits in the district had been duly assessed in the amount of $293,191.90 and that certificates of indebtedness amounting to $181,500.00 bearing interest at the rate of six per cent per annum, and negotiable in form, payable

serially through the years 1920 to 1934, had been issued in payment for the construction of the district. (Rec. 20)

The court further found that the Circuit Court of Jefferson County had duly levied a tax upon the benefits assessed at the rate of six and one-half per cent per annum to continue to be paid until the payment of all the district's indebtedness. (Rec. 20)

Under the heading "Declaration of Law" (Sec. 21) the court declared the law as follows:

> "The plaintiff and interveners are entitled to maintain this suit and to a mandatory injunction compelling the defendant commissioners and the defendant county clerks and county collectors to perform their duties in the collection of drainage taxes upon the lands in suit."

Upon these findings of fact and upon the above declaration of law the court ordered that a mandatory injunction issue requiring defendant county clerks "to extend upon the textbooks of their respective counties a tax of six and one-half per cent of the benefits assessed against each tract of land in the district for each of the years 1936 and the following years until the whole of this decree has been satisfied." (Rec. 21)

The respective county collectors were ordered to collect the tax so extended.

The court further ordered that the commissioners of the district be required "to institute suits for the collection of all delinquent taxes of said district and to prosecute the same with due diligence to a conclusion, and to see that the

delinquent lands are sold promptly under a decree of foreclosure, and that they be required to do all things necessary as commissioners of the said district to insure the prompt collection of the drainage taxes." (Rec. 22)

This decree the district appealed to the Circuit Court of Appeals for the Eighth Circuit where it was affirmed on November 23, 1937. (Rec. 37)

Kersh Lake Drainage District v. *State Bank & Trust Company*, 92 Fed. (2d) 783.

In its opinion the Circuit Court of Appeals stated that the appellant district's contentions were the following:

(1) That the original assessment of benefits in the district had been paid in full and that for this reason no further taxes could be imposed on the lands within the district. (2) That the statutes of Arkansas providing for interest upon benefits assessed have no application to the appellant district because they are not retroactive in effect and to increase assessed benefits by adding interest violates the state and federal constitutions; the statute of limitation. (Opinion, p. 783) Without going into the facts in the record, the court dismissed as groundless the questions raised under the constitution and the statute of limitation and, after considering the laws of Arkansas with reference to interest upon assessments of benefits, decided that such assessments bore interest and that the statutes providing for interest applied alike to districts organized before and after the passage of the statutes.

In obedience to the mandatory injunction of the federal court the clerks of the various counties extended taxes against the lands in their respective counties. And the col-

lectors of the three counties proceeded with the collection of taxes extended. There is nothing in the record to show what resulted in Desha or Jefferson Counties but in Lincoln County respondent Johnson and other taxpayers refused to pay. The commissioners of the district, in obedience to the mandatory injunction of the federal court, following the procedure outlined in such cases by the statutes of Arkansas, instituted a suit for foreclosure of the lands upon which the taxes were claimed to be delinquent. This is the suit now before the court.

The complaint in this case, after alleging the organization of the district, the assessment and levy of taxes therein and the delinquency of certain landowners in the payment of taxes, asked that the amount due upon each tract be declared a lien thereon and that a short time be fixed for its payment and that in the event of failure to pay, the land be sold to satisfy the lien. (Rec. 1 to 3) Respondent Johnson for himself and other landowners similarly situated filed an answer in which he set up his ownership of a certain one hundred and sixty acres sought to be sold for nonpayment of taxes and with respect to the particular tract of land involved alleged that he had paid the total benefits assessed thereon. (Rec. 4 to 5) In support of his allegation that the total benefits assessed against his land had been paid in full, respondent Johnson set up a decree rendered in the Lincoln Chancery Court on the 19th day of October, 1931, in which this contention was sustained in a suit in which Johnson and the drainage district were parties and in which was involved the question of the lability of this particular piece of land to further taxation. He also set up on behalf of other property owners in the district another decree of the same court entered on the 15th

day of June, 1932, in a suit in which other landowners and the drainage district were parties in which it was determined by the court that the full benefit assessed upon these particular lands and their full liability to the district for taxes had been satisfied. (Rec. 5-6)

The decrees referred to were exhibited with the answer and made a part of it. In the decree of October 19, 1931, the court found that Johnson was the owner of the land described; that it was included within the drainage district; that an assessment of benefits had been finally made and confirmed upon this particular tract of land and that the assessment so made and confirmed had been paid in full. It decreed that "the lien of the Kersh Lake Drainage District against the SW¼ of Section 8, Township 9 south, range 5 west by virtue of its assessment of benefits in the sum of $1600.00 is fully satisfied and released, that the tax extended by the commissioners for 1930 collectible in 1931 is without authority and void and the clerk of this court shall satisfy the record of delinquent lands returned to him in 1931 as far as the SW¼ of section 8, township 9 south, range 5 west is concerned, and the defendant commissioners are permanently restrained from extending other or further taxes against the said lands." (Rec. 7-8)

The decree of the 15th day of June, 1932, in the Lincoln Chancery Court involved Lincoln county lands of other taxpayers of the district. From the decree it appears that an audit of the affairs of the district had been made and filed in the case and that from the audit and other evidence submitted, the court found that the lands of the district were not subject to payment of taxes beyond the amount of benefits assessed upon them. It is apparent from the

decree that the audit showed the amount of benefits finally assessed against each tract of land involved and the amount which had been paid by the owner of that tract. The court held that those landowners who had paid the full amount of the benefit assessed against them were no longer subject to taxation and enjoined the district from attempting to collect further taxes of them. A list of these landowners appears in the record from page 10 to 16. It is to be remembered that they are the owners of land in Lincoln County and that the only landowners released were those who had paid the full amount of their tax liability to the district.

There were other pleadings by both parties which did not change the issue, whether the decrees of 1931 and 1932 were *res judicata* of the question presented in the present suit.

On trial of the suit in the Lincoln Chancery Court the decree was in favor of the district and against respondent Johnson. (Rec. 41-46) With respect to the defense interposed by respondent Johnson, the court said:

> "The court finds all the issues against the said A. J. Johnson and other property owners similarly situated which issues were set out in the answer filed by A. J. Johnson and amendments thereto." (Rec. 44)

Johnson appealed to the Supreme Court of Arkansas where the decision of the lower court was reversed, the opinion appearing in the record at pages 47-56. In its opinion (Rec. 53) the Supreme Court of Arkansas said:

> "The object of a writ of mandamus or a mandatory injunction is merely to require public officials to perform an existing duty and courts cannot require

than to do more than the law permits them to do. As was said in *United States* v. *County of Macon*, 99 U. S. 582, 591: 'We have no power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation.' And even though the Federal Court properly rendered the judgment in favor of the certificate holders against the appellee district and properly ordered the officials of the district to collect a tax upon the property of each citizen therein to pay the judgment, nevertheless this order did not deny to appellants and the individual taxpayer in that district the right to set up any defense against the tax assessment that he might have."

In the Arkansas Supreme Court a petition for rehearing was filed by the drainage district in which every point urged before this court was advanced and argued. (Rec. 56-63) The petition was denied (Rec. 63) and certiorari granted by this court.

Respondent makes this detailed statement in order to make clear from a confusing and tedious record the following propositions decisive of the questions raised in this case.

1. In the suit in the federal district court by the Bank of Wellston against the drainage district for a mandatory injunction in aid of its judgment against the district the only question involved was the right of the bank to compel the officers of the district to proceed with the duties charged upon them by law in the collection of the district's taxes and the payment of its debts. The judgment was admitted and the bank's right was beyond question because expressly conferred by the statute of Arkansas relating to such matters and sustained by general principles applicable to such cases. The decision of any other question

was neither necessary nor proper in the case. The federal district court's declaration of law in its decree shows that this was the real question decided.

2. In the suit in the federal district court the district opposed the issue of the mandatory injunction on the ground that there was no property in the district subject to assessment for the payment of the bank's judgment, that is, that the benefits assessed in the district had been fully collected. Conceding, for the argument, that the federal court properly decided this question against the district on the principle that it should not order the collection of taxes on property not in existence, the effect of the decision of the federal district court was not to bind the individual taxpayer in the district upon the question of the amount of unpaid benefit owed by the individual taxpayer to the district, and subject to collection by the district in the suit ordered by the federal district court. This is true because (1) the individual taxpayer was not and could not have been a party to the suit in the federal court, (2) the federal court did not have jurisdiction of a suit against the individual taxpayer and could not have had jurisdiction against the individual taxpayer even if he had been joined as defendant, (3) the amount of individual taxpayers liability to the district was not in question.

3. Included in the question whether there remained unpaid benefits subject to assessment by the district for the payment of the bank's judgment was the related question of whether the principal amount of benefits unpaid bore interest, the bank asserting, and the district denying, the right to interest. This was the question submitted to and decided by the Circuit Court of Appeals. Conceding,

for the argument, that in the suit for a mandatory injunction the federal district court decided the question of interest against the district the effect of the decision was to bind the taxpayers as a class and was not to bind the individual taxpayer on the question of the amount of his liability to the district, either principal or interest, when sued by the district in obedience to the order of the federal district court.

4. In the suit between respondent Johnson and the district in the Lincoln Chancery Court in 1931 the question was the amount of Johnson's individual liability as a taxpayer to the district. The only necessary or proper parties to the suit were Johnson and the district and the Lincoln Chancery Court was the only court with jurisdiction to decide the question involved. The Lincoln Chancery Court, in deciding in favor of Johnson, decided that Johnson had paid the full amount of benefit assessed against him and the full amount which the district had the power to collect from him. These statements are true of the suit in the Lincoln Chancery Court between Johnson and other taxpayers and the district which resulted in the decree of 1932.

5. Neither of the decrees of the Lincoln Chancery Court in 1931 and 1932 was called in question in the federal district court in the proceeding for a mandatory injunction. They could not have been called in question there because neither Johnson nor the other taxpayers were parties. When questioned, as here, in the same Lincoln Chancery Court, in a suit between the district and Johnson and the same taxpayers, for the same assessment, the issue being again on the amount of the liability of the taxpayer to the district, these decrees are, whether right or wrong, *res adjudicata* of the issues in the present suit.

6. The decision of the Arkansas Supreme Court sustaining the decree of the Lincoln Chancery Court of 1931 and 1932 in the present suit, therefore, does not deny full faith and credit to the judgment of the federal district court, nor hinder or prevent its enforcement, nor take property without due process.

SUMMARY OF THE ARGUMENT

I.

The Decision of the Arkansas Court Does Not Take the Property of the Creditors of Petitioner Without Due Process.

Alexander v. *Board of Directors Crawford County Levee Dist.* 97 Ark. 322, 330.

Cribbs v. *Benedict*, 64 Ark. 561.

Kelley Trust Co. v. *Paving District*, 184 Ark. 408.

Protho v. *Williams*, 147 Ark. 535, 536.

II

The Decision of the Supreme Court of Arkansas Does Not Prevent the Enforcement of the Order of the Federal District Court.

Cash v. *St. Louis, S. W. R. Co.* 162 Ark. 859.

Chandler, Rec., v. *Peketz*, 297 U. S. 609, 56 Sup. Ct. 602, 603 and 604.

State v. *St. L. S. F. R. Co.*, 162 Ark. 443, 454.

State v. *St. L. S. F. R. Co.*, 269 U. S. 172; 46 Sup. Ct. 67.

III

The Decision of the Supreme Court of Arkansas Does Not Deny Full Faith and Credit to the Judgment of the Federal Court.

City of Auburndale v. *State* 155 So. (Fla.) 97.

Ex parte Rowland, 104 U. S. 604, 612.

Grand Island R. Co. v. Baker, 45 Pac. 494.

Howard-Sevier Dist. v. *Hunt*, 166 Ark. 62.

In re Assessment Sewer Dist. No. 1, 147 Pac. (Wash.) 199.

Normandy Beach Development Co. v. U. S., 69 Fed. (Mo.) 105.

Northern Pac. R. Co. v. *Snohomish County*, 172 Pac. (Wash.) 878.

Ocean Beach Heights v. *Brown-Crumner Co.*, 302 U. S. 614, 58 Sup. Ct. 355.

Redwood Highland Co. v. *Town of Redwood*, 224 Pac. (Cal.) 780.

Rork v. *Smith*, 12 N. W. (Wis.) 408.

U. S. v. *County of Macon*, 99 U. S. 582, 591.

IV

No Question of Collusion in State Court Decrees Presented.

Chicot Co. Dist. v. *Baxter State Bank*, decided by this Court January 2, 1940.

Jeter v. *Hewitt*, 22 How. 532.

Tri-County District v. *Vincennes Bridge Co.*, 170 Ark. 22.

BRIEF

I

The Decision of the Supreme Court of Arkansas Does Not Deprive the District Creditors of Property Without Due Process.

In Arkansas all improvement taxes are based on benefits and have no other basis or justification. If there is no benefit there can be no tax or assessment. The limit of the benefit is, therefore, the limit of the tax. Taxation without benefits, or beyond benefits, is confiscation. The Arkansas court has always held that any exaction in excess of the special benefit is, to the extent of such excess, the taking of property without compensation and as such prohibited by the constitution.

Alexander v. Board of Directors Crawford County Levee District, 97 Ark. 322, 330.

Cribbs v. Benedict, 64 Ark. 561.

See also:

Kelley Trust Company v. *Paving District*, 184 Ark. 408.

Local Improvement districts like the petitioner here are quasi public corporations of strictly limited powers. The purchaser of the securities of such a district is charged with notice of the limitations provided by the laws under which the district is created. In the present case, the purchaser of the certificates of the petitioner district was charged with the knowledge that the certificates were payable exclusively from assessments levied by the district

upon the special benefits assessed against the various tracts of land in the district. The purchaser was also charged with the knowledge that the limit of these special assessments was the limit of the ability of the district to pay and with the knowledge of the methods provided by the laws governing the district for the collection of the assessments and the payment of the district's certificates.

Among other things, the purchaser was bound to know that these laws provided for the final determination of the amount of benefit legally collectible from any particular tract of land in Lincoln County by the Lincoln Chancery Court and for the decision of the question concerning the existence, amount or legality of the benefit on any particular tract of land in suits between the district and the taxpayer involved, without the presence of the certificate holder and without notice to him. The purchaser of such a certificate is therefore bound by the judgment of the court to which the state law commits such a question for decision, where the case in which the judgment is rendered is fairly conducted according to the forms of law provided.

There is nothing either novel or wrong in this procedure. It is the one followed in Arkansas from time immemorial. The chancery court having jurisdiction of the property involved, has jurisdiction over all suits between the property owner and the district and the power to determine the amount of the benefit on any particular tract as well as to cancel or set aside an illegal assessment of benefits.

Protho v. *Williams*, 147 Ark. 535, 536.

Any other procedure would render impossible the practical operation of the affairs of improvement districts. A

taxpayer could never maintain his right to a just assessment of benefits, in the court of the state having jurisdiction, if in order to obtain a final adjudication of the question he had to bring into the court every bondholder or certificate holder or creditor of the district. In many cases these are numerous. Frequently they are not represented by trustees and generally they do not reside in Arkansas. Rarely are any of them within the jurisdiction of the court or their identities known to the taxpayer or district.

It is, therefore, of no importance that the Bank of Wellston was not a party to the litigation between the district and respondent Johnson and other taxpayers in the Lincoln Chancery Court in 1931 and 1932. The statute creating the district fixes the parties to such a suit and the bank could not have been a party except by intervention on a showing that the District officers were not prosecuting the suit. For that matter, there is nothing in the record in the way of proof to show that the bank was not advised of the litigation since it does appear from the decree of the federal district court in the mandatory injunction suit that the district defaulted upon the payment of its certificates in the year 1929. (Rec. 22) Ordinarily, in such circumstances, the bank would have been in touch with affairs in the district.

In the brief on behalf of petitioner in the present case, much is said about depriving the bank of its property without due process. The Bank of Wellston, however, is not a party on the record to this suit. If the district represents it here so as to advance an argument concerning the taking of its property by the judgment in this suit then to the same

extent the district represented the bank in its suit with with the taxpayers in the state court in 1931 and 1932. Perhaps petitioner proceeds upon the theory that the creditors of the district and not the district are the owners of the liens for taxes, a notion long ago put at rest in *Barkley* v. *Levee Commissioners*, 93 U. S. 258.

II

The Decision of the Supreme Court of Arkansas Does Not Prevent the Enforcement of the Judgment of the Federal District Court in the Mandatory Injunction Case.

The pertinent language of the mandatory injunction is as follows:

> "It is, therefore, considered, ordered and decreed that a mandatory injunction issue requiring the defendant county clerks * * * to extend upon the tax books of their respective counties the tax of 6½ per cent of the benefits assessed against each tract of land * * * in the district for each of the years 1936 and the following years until the whole of this decree has been satisfied." (Rec. 21)

And that the:

> "Commissioners of said district be required to institute suit for the collection of all delinquent taxes of said district and to prosecute the same with due diligence to a conclusion." (Rec. 22)

At the date of the order of the federal district court there were outstanding uncollected benefits in the district in excess of the judgments held against the district. But there were no "benefits assessed" against respondent Johnson's land nor against the lands of those other taxpayers associated with him in the suit in the Lincoln Chancery Court in 1932. Benefits had been assessed against John-

son's land and the lands of the other taxpayers involved in these suits but they had been paid in full and the assessments had been extinguished by payment and by the decrees of the Lincoln Chancery Court sustaining the claim of payment in full in the litigation between respondent and the district. The decree of the federal court did not deal with individual assessments or purport to deal with them. It merely directed the collection of a tax of 6½ per cent of "the benefits assessed against each tract of land." If no benefits were assessed on the tract the order did not require a tax to be collected. If it had, and a tax had been levied, the tax would have been void and could not have been collected.

Cash v. *St. Louis Southwestern R. R. Co.* 169 Ark. 859.

The federal district court had no authority to order the county clerk to confiscate private property or to order the commissioners to institute a confiscatory suit and the order made by the federal court is not susceptible of a construction that would give it that effect. The Arkansas court in the present case had the right and it was its duty to pass on the validity of the claim brought against Johnson by the commissioners in a mistaken interpretation of the order of the federal court. When the state court determined as it did here that there were no benefits on the Johnson land against which a tax could be legally extended it did not determine any matter which had been adjudicated by the district court nor refuse to give full effect to its judgment.

State of Arkansas v. *St. Louis-San Francisco Ry. Co.* 269 U. S. 172; 46 Sup. Ct. 67.

State v. *St. Louis-San Francisco Ry. Co.* 162 Ark. 443, 454.

The authorities relied on by petitioner in support of its argument that the decision of the Arkansas court prevents the enforcement of its judgment by the federal district court are not in point and have no application. *Supervisors* v. *Durant*, 96 (9 Wall) U. S. 415; *Mayor* v. *Lord*, 96 (9 Wall) U. S. 409; *Hawley* v. *Fairbanks*, 108 U. S. 543. This court's decisions in these cases did not turn upon the fact that the mandamus or mandatory injunction compelling the levy of a tax had issued out of a federal court and that the injunction against collecting the tax had issued out of a state court. The question of conflict between the courts, state and federal, was not involved. Rather, as the court pointed out in *Supervisors* v. *Durant*, the principle involved was not that the federal court as such had any paramount jurisdiction of state courts but that the respective courts are independent of each other. In the opinion in this case the court said that the federal district court is as independent of control by a state court as are the district courts of the state from control by each other. It follows necessarily that since the trial courts, state and federal, are independent of each other neither can control the other. Further in each of the cases involved, as the court was careful to point out (*Hawley* v. *Fairbanks*), the right to the computation and assessment as well as the collection of the tax followed as a matter of law from the establishment of the liability of the municipality by the judgment of the federal court in aid of which the mandamus was issued.

All of these cases involved mandamus proceedings in aid of the holders of judgments against towns or counties. The judgments had been obtained against the municipalities on bonds issued by them, payable out of ad valorem taxes

levied upon the property within the town. The orders of mandamus were opposed by the municipality upon the faith of an injunction obtained against the town or county in the state court prohibiting the levy or collection of any tax upon any property on the ground of the invalidity of the bonds. But the federal court by its judgment in favor of the bondholders had determined the legality of the bonds and for that reason the right to the collection of the tax followed as a matter of law on any property in the town or county subject to taxation.

There was no question of the existence of the property nor of its liability to tax if the bonds were valid and their validity was determined by the judgment of the federal court. The objection interposed to the mandamus in these cases was not that the property of an individual taxpayer sought to be taxed did not exist or was not such as could be legally taxed, but that no tax whatever on any property could be levied in response to the mandamus. The objection to the mandamus which this court overruled in these cases was advanced by the municipality itself upon grounds necessarily precluded by the judgment of the federal court in aid of which the mandamus was sought.

The situation is entirely different here. The drainage district is not interposing as a defense to the mandatory injunction of the federal court an injunction of a state court prohibiting the drainage district from levying or collecting any taxes in the district. The drainage district admits the validity of the federal court decree and obeys it. Respondent Johnson in his individual capacity, admitting the right of the federal court to issue a mandatory injunction and the duty of the district to comply with it, defends the

suit brought in obedience to the federal order on the ground, personal to him alone, that there are no benefits existing upon his land and unpaid, against which the mandatory injunction of the federal court may operate. The taxes ordered to be collected by the mandatory injunction in this case are collectible only from the benefit assessed. If there is no benefit in existence upon any particular taxpayers land, if the benefit liability has been discharged in full, there is no property in existence against which the officer obeying the mandatory injunction of the federal court may proceed.

An analogous situation might have arisen had an individual taxpayer of one of the municipalities involved in the cases under discussion defended a suit brought by the town in obedience to mandamus upon the ground that there was no property in existence on which the tax could be levied or upon the ground that the property was a species exempt from the tax or upon the ground that he had paid the tax sued for. Such a defense, personal to the taxpayer is one that he has the right to make at all events against an exaction, illegal for any reason, and the right to make it is not lost by the mere fact that a federal court has ordered a tax levied on and collected from all property lawfully subject to the tax. The defense interposed by the taxpayer is one personal to himself and as pointed out by this court in the decisions next cited, he is not precluded from making it in the circumstances of this case.

Rees v. City of Watertown, 86 U. S. 107.

Chandler, Receiver, v. Peketz, 297 U. S. 609; 56 Sup. Ct. 602, 603 and 604.

State of Arkansas v. St. Louis-San Francisco Ry. Co. 269 U. S. 172; 46 Sup. Ct. 66, 67.

III

The Decision of the Supreme Court of Arkansas Does Not Deny Full Faith and Credit to the Judgment of the Federal Court.

It is true that an improvement district in Arkansas represents its taxpayers generally in litigation between the district and its creditors in all matters pertaining to the rights of the taxpayers as a class.

Howard-Sevier Road Improvement District v. *Hunt*, 166 Ark. 62.

But this is not to say, as petitioner does, that the district does or may represent its taxpayers in their individual capacities, nor an individual taxpayer in regard to rights personal to the taxpayer and adverse to the district, and not involved in the litigation between the district and its creditors.

The judgment of the federal district court in favor of the Bank of Wellston against the district precluded every taxpayer in the district upon the question of the validity and amount of the certificates held by the bank and upon the right of the bank to its judgment. The judgment of the federal court in the suit by the bank for a mandatory injunction bound every taxpayer in the district upon the question of the right of the bank to compel the officers of the district to extend taxes against all benefits unpaid and liable to taxation and to bring suits for the collection of all taxes unpaid and owing to the district. But neither judgment bound any individual taxpayer on the question of whether, in his individual capacity, the taxpayer was in

fact or in law indebted to the district when sued in obedience to the order of the federal court.

The taxpayers, in neither suit in the federal court, had any right to become parties or to be made parties. The suits were against the district and not against the taxpayers.

Rork v. *Smith*, 12 N. W. (Wis.) 408.

In re Assessment for Local Improvement Sewer District No. 1, 147 Pac. (Wash.) 199.

Grand Island & W. N. & R. Co. v. *Baker*, 45 Pac. 494.

City of Auburndale v. *State*, 155 So. (Fla.) 97.

Redwood Highlands Co. v. *Town of Redwood*, 224 Pac. (Cal.) 780.

Northern Pacific Ry. Co. v. *Snohomish County*, 172 Pac. (Wash.) 878.

The individual taxpayer not only had no right to be a party to the litigation between the bank and the district but he could not intervene in the case for the purpose of taking an appeal in the event the district did not.

Normandy Beach Development Company v. *U. S.* 69 Fed. (2d) 105.

Ocean Beach Heights v. *Brown-Crummer Co.*, 302 U. S. 614; 58 Sup. Ct. 385.

The only proper parties to a mandamus, or to a proceeding in equity for a mandatory injunction) are the relators who seek to compel the performance of a duty and those upon whom the duty is imposed by law.

There is no difference between a mandamus and a mandatory injunction in aid of a judgment except that one issues from a court of law and the other from a court of

equity. The judgment in either suit does not, and in the nature of things cannot, run against third persons not parties to the suits upon rights personal to them, for the determination of which according to law, they are entitled to a day in court."

Further, the object of a writ of mandamus or a mandatory injunction is merely to enforce the performance of an existing duty, not to create new rights or new duties.

Ex parte Rowland, 104 U. S. 604, 612.

No court has power either by mandamus or mandatory injunction in aid of its judgment to compel the levy of a tax which is not authorized by law.

U. S. v. County of Macon, 99 U. S. 582, 591.

In the suit for the mandatory injunction the federal court had the right to compel the officers of the district to levy and collect a tax on benefits to the extent that such benefits were subject to taxation. It did not have the power to decide and it did not attempt to decide whether any individual tract of land was subject to taxation under the law. The very purpose of the federal district court's order was to submit to the court having jurisdiction, questions of this character which might arise between the district and the taxpayer. The action of the bank in applying to the federal court for the mandatory injunction, the action of the court in granting the injunction were both in recognition of the necessity for the determination of these questions if any arose and in recognition of the right of the taxpayer to be heard on the question in a court of jurisdiction.

The decision of the Supreme Court of Arkansas, therefore, does not deny full faith and credit to the decree of the federal district court. On the contrary it is made in full recognition of that order, in compliance with it and in an effort to decide the very questions which the federal court, by its order, directed to be submitted to the state court for its decision.

IV

The Question of Collusion in the State Court and of Amount of Benefits Remaining to Pay the Judgment Against Petitioner Are Not Presented in This Case.

There is neither allegation nor proof in this case tending to support petitioner's claim of collusion in the decrees in the state chancery court in 1931 and 1932, or to show that if these decrees are sustained the creditors of the district will be unable to collect their judgments. When respondent interposed the decrees of the Lincoln Chancery Court in defense to this suit the district failed to attack the decrees on the ground of collusion and the creditors, who are represented by the same counsel who represents the district, failed to intervene for that purpose or to bring an independent suit to establish that allegation. No evidence was offered upon the question which was raised for the first time upon appeal.

The basis for the argument is found in the fact that in the second decree it appears from the lands described that some of the commissioners of the district were relieved from the payment of further taxes upon some of their lands. However petitioner seems to concede that there was no collusion in the state court decree in 1931 in which Johnson

was a party. That decree determined the question of law involved and as the record shows, was followed very naturally by a similar suit by other taxpayers who found themselves in the same position as Johnson. It is fairly inferable from the record that in this proceeding the court determined to settle all issues of this character between the district and its taxpayers in one proceeding. An audit of the affairs of the district was made which shows that some of the lands of a number of taxpayers including some of the lands of the commissioners had satisfied in full the benefit assessed against them. The decree, therefore, relieved all of these taxpayers of further payment of taxes. Reference to the list of taxpayers relieved will show among them various insurance companies and individuals not parties to the class suit. The party most frequently mentioned seems to have been the State of Arkansas whose lands are not subject to taxation for improvement districts while the title remains in the state.

The statement of petitioner to the effect that the bank will not be able to collect its judgment if the action of the Arkansas court is sustained is wholly unsupported in the record. The meaning of the Victor Felley exhibit on page 41 of the record is not clear and the purpose of its presence in the record cannot be determined with certainty but it does show as outstanding in the district the following benefits as of September 13, 1935, several years after the entry of the state court decrees:

Delinquent benefits	$39,899.30
Assessed benefits unpaid	52,119.40
Total	$92,018.70

To this sum must be added six per cent interest per annum for more than 20 years or a total of more than 100 per cent of the uncollected benefits. In addition it appears from the decree in the federal district court that the district claimed to own lands subject to sale by it for payment on the judgment. (Rec. 19).

Nor is it important that the decrees of the state court may have been erroneous. They are nevertheless binding until reversed on appeal or set aside in a proper action.

Chicot County Drainage District v. *Baxter State Bank*, decided by this court January 2, 1940.

Jeter v. *Hewitt*, 22 How. 352.

Tri-County Highway Improvement District v. *Vincennes Bridge Company*, 170 Ark. 22.

CONCLUSION

The decrees of the Lincoln Chancery Court of 1931 and 1932 were *res judicata* in this suit against respondent. The decision of the Arkansas Supreme Court was right.

It is respectfully submitted that the writ of certiorari granted in this case should be dismissed and the decision of the Supreme Court of Arkansas affirmed.

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